No. 48728-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Trygve Nelson,

Appellant.

Lewis County Superior Court Cause No. 13-1-00446-6

The Honorable Judge Richard Brosey

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

WASHINGTON STATE STATUTES

OTHER AUTHORITIES

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE THIRD-DEGREE ASSAULT.

A. Neither DeLapp nor Ross were performing nursing or health care duties when they unlawfully restrained Mr. Nelson.

The altercation between Mr. Nelson and the two nurses occurred when DeLapp and Ross tried to stop Mr. Nelson from leaving his hospital room. RP (9/19/13) 31-32, 90, 104, 107. The nurses had no authority to restrain him. *See* Appellant's Opening Brief, pp. 6-10. Because they were committing a felony by "knowingly restrain[ing] another person," the nurses were not performing "nursing or health care duties" at the time of the incident. RCW 9A.40.040; RCW 9A.36.031.

Without citation to authority, Respondent suggests that Mr. Nelson's discharge status impacted the lawfulness of the restraint. Brief of Respondent, pp. 6-8. Where no authority is cited, a court may presume that counsel found none after diligent search. *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 296, 381 P.3d 95 (2016).

Contrary to Respondent's position, Mr. Nelson's argument does not depend on his discharge status.[1] Whether or not he'd been formally discharged, the nurses lacked authority to prevent him from leaving. They

[1] By the end of trial, both nurses admitted that he had been discharged. (9/19/13) 106, 108-109, 114.

did not have a basis for either a citizen's arrest or an ITA detention under former RCW 71.05.050 (2013) and former RCW 71.05.153(1)-(2) (2013). *See* Appellant's Opening Brief, pp. 6-10.

Lacking authority to hold Mr. Nelson, the nurses were not privileged to "restrain [him] and return him to his stretcher/bed." Brief of Respondent, p. 7. The state does not respond to Mr. Nelson's arguments regarding the nurses' lack of authority, other than focusing on whether or not he'd been discharged. Brief of Respondent, pp. 6-8. This failure may be taken as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Nor can the convictions be sustained on the theory that "DeLapp acted in part to prevent Nelson from running into another patient." Brief of Respondent, p. 7. The record shows that DeLapp did more than simply stop Mr. Nelson from colliding with another patient. Instead, DeLapp "grabbed him like in a bear hug, picked him up, walked him back into the room and put him on the bed," all while Mr. Nelson was "struggling and fighting [and] resisting." RP (9/19/13) 32. Furthermore, there is no suggestion that Ross sought to keep Mr. Nelson from colliding with another patient, even if that was DeLapp's initial goal.

Even when taken in a light most favorable to the state, and even if Mr. Nelson was not formally discharged, the evidence does not show that

DeLapp and Ross had authority to detain him. Their felonious acts were not "nursing or health care duties." RCW 9A.36.031(1)(i).

The evidence was insufficient for conviction on the assault charges. The charges must be dismissed with prejudice. *State v. Mau*, 178 Wn.2d 308, 312, 317, 308 P.3d 629 (2013).

B. The state failed to disprove self-defense.

1. Mr. Nelson may argue the state's failure to disprove self-defense for the first time on review.

An appellant may raise for the first time on review any manifest error affecting a constitutional right. RAP 2.5(a)(3). The appellant need only make "a plausible showing that the error... had practical and identifiable consequences in the trial." *State v. Lamar,* 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.* An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

Here, the state's failure to disprove self-defense had practical and identifiable consequences. Because there was "some evidence"[2] of self-defense, the absence of self-defense became "another element of the offense, which the State must prove beyond a reasonable doubt." *State v. Woods*, 138 Wn. App. 191, 198, 156 P.3d 309 (2007); *see* Appellant's Opening Brief, pp. 10-11. The "trial court knew at [the] time" that the record included some evidence of self-defense, and that the state had failed to disprove the defense. Accordingly, the error is manifest. *O'Hara*, 167 Wn.2d at 100.[3]

Furthermore, "[a] criminal defendant may always challenge for the first time on appeal the sufficiency of the evidence supporting a conviction." *State v. Kirwin*, 166 Wn. App. 659, 682, 271 P.3d 310 (2012). Here, Mr. Nelson argues that the evidence is insufficient for conviction. The issue may be raised for the first time on review. *Id.*

The error can also be raised under RAP 2.5(a)(2). Having failed to prove the absence of self-defense, the prosecution "fail[ed] to establish facts upon which relief can be granted." RAP 2.5(a)(2). Respondent does

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[2] *State v. Thysell*, 194 Wn. App. 422, 426, 374 P.3d 1214 (2016) (internal quotation marks and citations omitted).

[3] In these circumstances, the trial court "could have corrected the error" by dismissing for insufficient evidence. *O'Hara,* 167 Wn.2d at 100.

not address RAP 2.5(a)(2). This can be taken as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

Mr. Nelson does not fault the trial court for the lack of instructions on self-defense. He concedes that the state was not required to persuade the jury on the issue of self-defense. However, his failure to request instructions on self-defense does not excuse the state from presenting evidence disproving self-defense, once it became an element of the crime. *Woods,* 138 Wn. App. at 198; *see also State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). A deficiency in the state's proof of an element is not cured when the element is also omitted from the instructions. *See Kirwin,* 166 Wn.App. at 672 ("In Ms. Kirwin's case, of course, the to-convict instruction did omit an element—an element the State did not prove.")

Nor does this issue impact Mr. Nelson's right to control his defense. The state's obligation to disprove self-defense arises whenever there is "some evidence" supporting the defense. *Thysell*, 194 Wn. App. at 426. Placing this burden on the state does not require the court to instruct the jury over a defendant's objection. *Cf. State v. Lynch*, 178 Wn.2d 487, 309 P.3d 482 (2013).

The state's argument, in effect, is that Mr. Nelson waived his right to hold the state to its burden of proof. Respondent cites no authority for

the proposition that a defendant waives a claim of evidentiary insufficiency where an element is omitted from the court's instructions. Brief of Respondent, pp. 9-11.

2. Mr. Nelson had the right to use force to prevent an offense against his person or to resist an attempt to commit a felony upon his person.

Mr. Nelson does not claim that DeLapp or Ross "were about to injure Nelson." Brief of Respondent, p. 11. Instead, he contends that he had the right to use force because the two were attempting to unlawfully restrain him, in violation of RCW 9A.40.040. As outlined above and in the Opening Brief, DeLapp and Ross had no legal basis to prevent Mr. Nelson from leaving. Their attempt to do so entitled him to use force.

The state's failure to disprove self-defense requires reversal of Mr. Nelson's assault convictions. The charges must be dismissed with prejudice. *Mau*, 178 Wn.2d at 312, 317.

II. THE STATE FAILED TO PROVE THIRD-DEGREE MALICIOUS MISCHIEF.

Malicious mischief requires proof of "physical damage." RCW 9A.48.090(1)(a). Mr. Nelson did not cause physical damage.

Although the floor required cleaning, it did not require repair. Respondent's argument that the cost of repairs can be considered in evaluating the amount of damage inflicted is therefore irrelevant. *See*

Brief of Respondent, pp. 12-13 (citing *State v. Gilbert*, 79 Wn.App. 383, 902 P.2d 182 (1995) and *State v. Ratliff*, 46 Wn. App. 325, 730 P.2d 716 (1986)). Both *Gilbert* and *Ratliff* involved physical damage that was repaired.

Respondent does not provide any authority establishing that defecating on a floor amounts to "physical damage," or that the word "repair" should be broadly construed to include cleaning. This court may presume that counsel found no authority in support of these arguments. *Hood Canal*, 195 Wn. App. at 296.

Because the state failed to prove physical damage, the conviction cannot must be dismissed with prejudice. *Mau*, 178 Wn.2d at 312, 317.

III. THE COURT SHOULD NOT HAVE ORDERED MR. NELSON TO PAY LEGAL FINANCIAL OBLIGATIONS.

The state has conceded that the trial court failed to make the proper inquiry prior to imposing discretionary LFOs. Accordingly, no further argument is provided.

IV. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

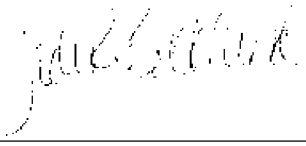
Respondent has not addressed Mr. Nelson's argument regarding appellate costs. This may be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

CONCLUSION

Mr. Nelson's convictions must be reversed and the charges dismissed with prejudice. Alternatively, the court must vacate his legal financial obligations and remand for a hearing on his ability to pay and his mental health condition under RCW 9.94A.777.

Respectfully submitted on December 7, 2016,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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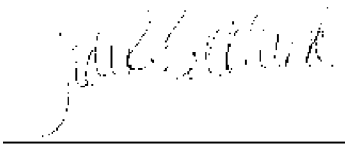
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 7, 2016.



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